

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGORY ACKERS,

Plaintiff,

v.

YAHOO INC.,

Defendant.

Case No. 16-cv-05811 NC

**REPORT AND
RECOMMENDATION TO GRANT
APPLICATION TO PROCEED IN
FORMA PAUPERIS AND TO
DISMISS COMPLAINT UNDER 28
U.S.C. § 1915 REVIEW**

Re: Dkt. Nos. 1, 2

Pro se plaintiff Gregory Ackers filed a civil complaint and a motion for leave to proceed in forma pauperis. Dkt. Nos. 1, 2. In his complaint, Ackers alleges that defendant Yahoo, Inc. engaged in computer fraud and abuse, wire fraud, breach of warranty, and negligence. Dkt. No. 1. This order is the Court's initial screening review for civil actions filed in forma pauperis. For the reasons stated below, I recommend that the District Court Judge (1) GRANT Ackers' application to proceed in forma pauperis, and (2) DISMISS his complaint because it does not establish federal subject matter jurisdiction.

I. APPLICATION TO PROCEED IN FORMA PAUPERIS

Under 28 U.S.C. § 1915, a district court may authorize the commencement of a civil action in forma pauperis if it is satisfied that the would-be plaintiff cannot pay the filing fees necessary to pursue the action. 28 U.S.C. § 1915(a)(1). Here, Ackers submitted the Case No. 16-cv-05811 NC

1 required documentation and it is evident from the application that the listed assets and
2 income are insufficient to enable him to pay the filing fees. Dkt. No. 2. Accordingly, I
3 recommend that the District Court Judge GRANT Ackers' application to proceed in forma
4 pauperis.

5 **II. SCREENING UNDER 28 U.S.C. § 1915(e)(2)**

6 A complaint filed by any person proceeding in forma pauperis pursuant to 28
7 U.S.C. § 1915(a) is subject to a mandatory and sua sponte review and dismissal by the
8 Court if it is frivolous, malicious, fails to state a claim upon which relief may be granted,
9 or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §
10 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

11 The Court first considers whether it possesses jurisdiction over this dispute. The
12 federal courts are courts of "limited jurisdiction" and only have jurisdiction as authorized
13 by the Constitution and Congress. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365,
14 374 (1978). The party seeking to invoke federal court jurisdiction (here, plaintiff Ackers)
15 has the burden of establishing that federal subject matter jurisdiction exists. *Scott v.*
16 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). The Court must presume a lack of
17 jurisdiction until the plaintiff establishes otherwise. *Id.*

18 Potential sources of subject matter jurisdiction in this case are: (1) diversity
19 jurisdiction, and (2) federal question jurisdiction. Ackers alleges diversity jurisdiction
20 only. I consider each jurisdictional source in turn.

21 Ackers alleges the Court has subject matter jurisdiction due to "complete diversity
22 of citizenship," and an amount in controversy exceeding \$75,000. *Id.* at 1-2. "Diversity
23 jurisdiction" is assessed under 28 U.S.C. § 1332. The court considers the citizenship of
24 each party to the lawsuit, and there must be "total diversity" of citizenship between each
25 plaintiff and each defendant, and the amount in controversy must exceed \$75,000.
26 Corporations are deemed to be citizens of every state in which they are incorporated and
27 where they have their principal place of business. 28 U.S.C. § 1332(c)(1).

28 Here, Ackers is a citizen of California, and the complaint does not allege the

1 “citizenship” of corporate defendant, Yahoo, Inc., but it does note Yahoo was formed in
2 Delaware and conducts business in Santa Clara, California, where its corporate
3 headquarters is located. Dkt. No. 1 at 2. If Ackers and Yahoo are both California citizens,
4 then there is no diversity of citizenship. The Court does, however, find that the complaint
5 alleges an amount in controversy exceeding \$75,000.

6 “Federal question” jurisdiction is assessed under 28 U.S.C. § 1331. The federal
7 district courts have jurisdiction “of all civil actions arising under the Constitution, laws or
8 treaties of the United States.” 28 U.S.C. § 1331. A case “arises under” federal law if a
9 “well-pleaded complaint establishes either that federal law creates the cause of action or
10 that the plaintiff’s right to relief necessarily depends on resolution of a substantial question
11 of federal law.” *Empire Healthcare Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006)
12 (citations omitted).

13 Here, liberally construing Ackers’ complaint, he does not present a federal question
14 sufficient to establish subject matter jurisdiction. The complaint states that defendants
15 “engaged in COMPUTER FRAUD & ABUSE, WIRE FRAUD & BREACH OF
16 CONTRACT by the complete lack of honorability & transparency in re; [defendant’s]
17 TERMS OF SERVICE. The aforementioned complaint stands as a TORT CLAIM in re;
18 [defendant’s] NEGLIGENCE in protecting & informing their consumers.” Dkt. No. 1 at 1.
19 While Ackers alleges violations of 18 U.S.C. §§ 1030 and 1343 in his complaint, the Court
20 notes there is no private right of action for violations of § 1343, *see Reynolds v. Wilkerson*,
21 No. 13-cv-04855 LHK, Dkt. No. 53, 2014 WL 4062771, at *4 (N.D. Cal. Aug. 14, 2014),
22 though there is one available for § 1030, subject to several limitations, which Ackers has
23 not addressed. 18 U.S.C. § 1030(g). As pled, Ackers has not asserted facts to support a
24 violation of § 1030, and has not provided the Court with a “short and plain statement” of
25 his claim showing he is entitled to relief. Fed. R. Civ. P. 8. Furthermore, Ackers appears
26 to allege violations of the Tariff Act, 19 U.S.C. § 1592. Dkt. No. 1 at 3. However, based
27 on the plain language of the statute, that section sets forth civil penalties for making false
28 statements to the United States or illegally importing merchandise. 19 U.S.C. §

1 1592(a)(1).

2 In conclusion, I find that Ackers' complaint does not satisfy federal subject matter
3 jurisdiction. It establishes neither a federal question nor diversity of citizenship. "If
4 jurisdiction is lacking at the outset, the district court has no power to do anything with the
5 case except dismiss." *Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004).
6 Therefore, I recommend dismissing the suit for lack of jurisdiction.

7 Even if Ackers were able to establish federal jurisdiction, his complaint would also
8 need to be amended to comply with the pleading rules of Federal Rule of Civil Procedure
9 8. Rule 8 requires the complaint to contain a short and plain statement of the claim
10 showing the pleader is entitled to relief. Liberally construed, Ackers' complaint appears to
11 state law tort claims and violations of federal law. However, the basis for these federal
12 violations is unclear and inadequately pled in the complaint.

13 **III. CONCLUSION**

14 This case will be reassigned to a District Court Judge because not all parties have
15 consented to proceed before a magistrate judge. Dkt. No. 5. I RECOMMEND that the
16 District Court Judge (1) GRANT the motion for leave to proceed in forma pauperis; and
17 (2) DISMISS the case for lack of federal subject matter jurisdiction with leave to amend.

18 Any party may object to this recommendation, but must do so within fourteen days
19 of being served. Fed. R. Civ. P. 72(b). A failure to file a timely objection will waive any
20 opposition to the recommendation.

21 Finally, the Court informs Ackers that the Federal Pro Se Program at the San Jose
22 Courthouse provides free information and limited-scope legal advice to pro se litigants in
23 federal civil cases. The Federal Pro Se Program is available by appointment and on a
24 drop-in basis. The Federal Pro Se Program is available at Room 2070 in the San Jose
25 United States Courthouse (Monday to Thursday 1:00 – 4:00 pm, on Friday by appointment
26 only), and The Law Foundation of Silicon Valley, 152 N. 3rd Street, 3rd Floor, San Jose,
27 CA (Monday to Thursday 9:00 am – 12:00 pm, on Friday by appointment only), or by
28 calling (408) 297-1480.

IT IS SO ORDERED.

Dated: October 28, 2016



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California

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